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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 425

LUKE MANION,

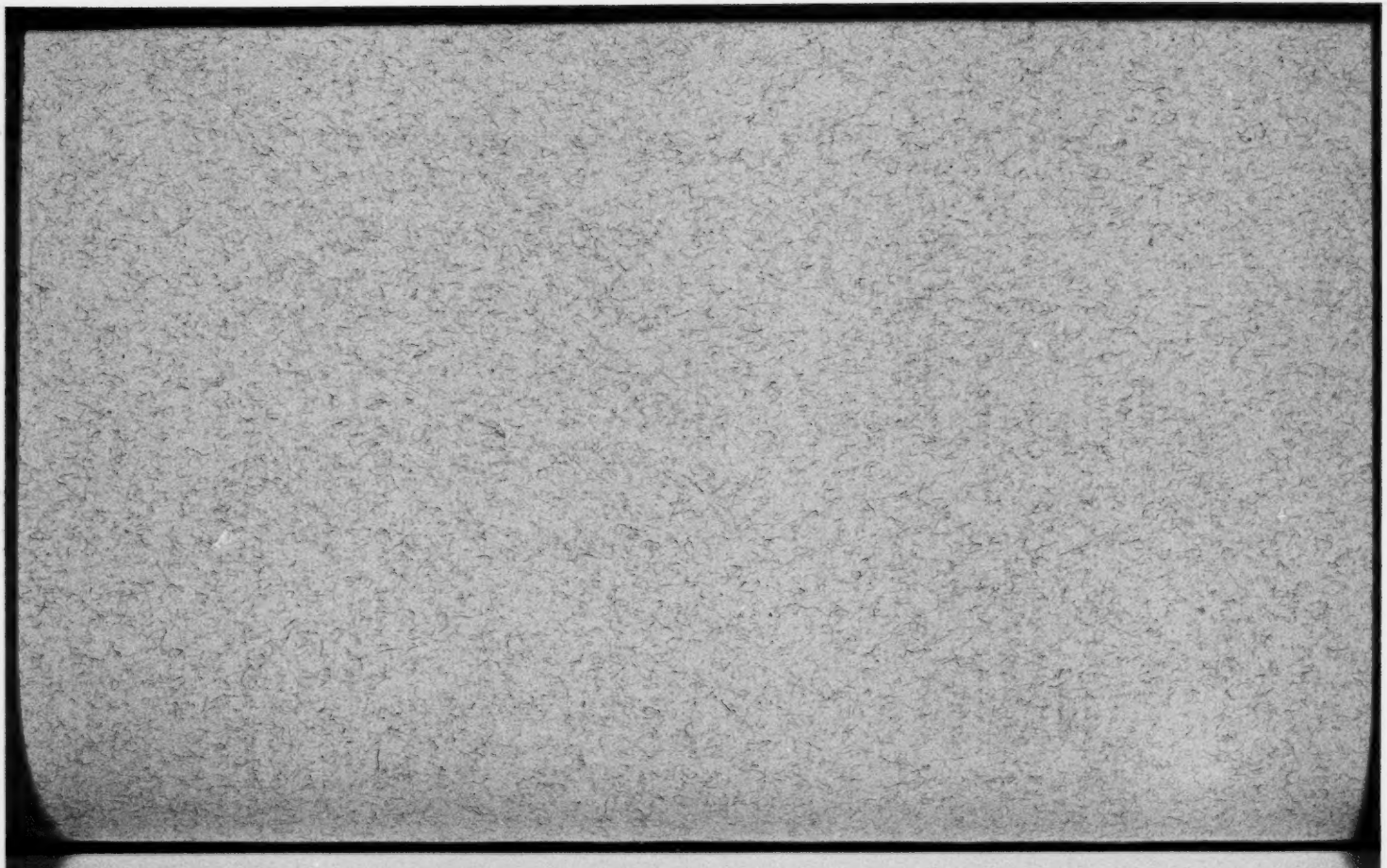
Petitioner,

vs.

STATE OF MICHIGAN AND G. DONALD KENNEDY,
MICHIGAN STATE HIGHWAY COMMISSIONER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

EUGENE F. BLACK,
Counsel for Petitioner.



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MAY IT PLEASE THE COURT:

The petition of Luke Manion, a resident of Marine City, Michigan, respectfully shows to this Honorable Court:

Opinions Below.

The opinion of the Supreme Court of Michigan, which is the basis of the judgment petitioner seeks to have this Court review, was handed down September 8, 1942 (R. 22).[1] It is not as yet officially reported but appears commencing on page 22 of the certified record. The opin-

[1] Counsel for petitioner is about to be called into the Naval service; hence the immediate preparation and filing of this petition.

ions of the Michigan Court of Claims, in which court this case originated, are not officially reported. The opinion of that court appears commencing on page 11 of the certified record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended (28 U. S. C. A., sec. 344).

Questions Presented.

1. Is a State court, which holds exclusive jurisdiction to hear and determine all claims and demands, ex contractu and ex delicto, against a sovereign State (Michigan), obliged to follow and apply the maritime law of the United States in determining whether, in an action brought therein under the Jones Act for commission of a maritime tort, the defendant State may rely on a pleaded defense of Governmental immunity *from liability?*

2. In the same circumstances, does the maritime law of the United States recognize or permit any such pleaded defense?

Summary Statement of the Matter Involved.

The Michigan Court of Claims, in which this suit originated, was created by Legislative Act in 1939 (Mich. Stat. Ann. 27.3548). The Act will be referred to herein as the "Court of Claims Act".[2] By Section 8 of such Act the Court of Claims was granted exclusive power and jurisdiction: "To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State (Michigan) and any of its departments, commissions, boards, institutions, arms, or agencies."

[2] Summarized in appendix.

On June 8, 1939, petitioner, a seaman, was in employ of the respondent State Highway Commissioner as Chief Engineer of the steam vessel "St. Ignace", which vessel, at the time of commission of the tortious acts hereinafter mentioned, was owned and operated by the respondent State Highway Commissioner and was engaged as a marine carrier in ferrying vehicles, passengers and freight for consideration across the navigable waters of the Straits (of Mackinac) which navigably join Lakes Michigan and Huron (R. 3, 4). These marine operations were being carried on in pursuance of statute (Mich. Stat. Ann. 9.1391).

While petitioner was off duty, and standing on the main deck of the vessel, and while the vessel was on voyage across the Straits, a collision occurred between the "St. Ignace" and another steam vessel, the "City of Cheboygan", which second vessel was similarly owned and operated by the respondent State Highway Commissioner, was similarly engaged, and was then proceeding on opposite directional course in and over the same waters (R. 3). The collision, without negligence on the part of the petitioner, was solelly caused by negligence of the officers and navigating seamen of both vessels, which negligence largely consisted of excessive speed in a dense fog in violation of federal navigation rules (R. 4, 5). As a result of such collision, petitioner was personally injured and damaged (R. 5, 6).

Counting on the maritime tort so committed against him, petitioner duly instituted action in the aforesaid Court of Claims, and asked judgment against the defendant State and State Highway Commissioner in the sum of $19,500.00 (R. 6, 7). Petitioner's Statement of Claim (otherwise termed "petition" in the Court of Claims Act), by which this action was instituted in the Court of Claims, concluded with special

setting up of, and reliance upon, the general maritime law and "the statutes of the United States relating to navigation and liability of steam vessel owners and operators for negligently inflicted injuries to seamen." (R. 6).

Within the time allowed for such motions, the respondents (defendants below) moved to dismiss petitioner's statement of claim for the single reason that:

> "The said defendants, at the time and place of the grievances set forth in said petition, were engaged in the performance of a Governmental function and are not liable for the alleged negligent or tortious acts of such officers, agents, or employees." (R. 9).

The respondents (defendants below) concede that, by the Court of Claims Act, Michigan's sovereign immunity *from suit* brought against it in that Court was and is unconditionally waived (R. 12). They contend, however, in support of the foregoing motion to dismiss, that a sovereign state originally possessed and now possesses (over and above the presently waived immunity from suit) a defense of immunity *from liability* for *maritime* torts, and that such defense of immunity *from liability* has never been waived so far as Michigan is concerned.

The Court of Claims upheld the motion to dismiss and entered judgment for respondents. Petitioner thereupon duly appealed to the Supreme Court of Michigan and that court, by 5 to 2 vote, upheld the judgment of the Court of Claims.

Specification of Errors.

1. The Supreme Court of Michigan erred in denying to petitioner, a seaman, his specially set up and claimed right of action under Federal statutes and maritime rules which prescribe the rights of seamen who are injured, by actionable negligence, on the federally justiciable waters of the Great Lakes.

2. The Supreme Court of Michigan erred in holding that a local defense of Governmental immunity from liability extends to and wipes out the right of action of an injured seaman that is provided by the Jones Act.

3. The Supreme Court of Michigan erred in holding that the defense of sovereign immunity from liability, as created by local law in non-maritime cases, is determinative of maritime rights in a suit planted on the maritime law.

4. The Supreme Court of Michigan erred in refusing to apply the maritime law of the United States, as defined by this Court, in determining the issue raised by respondents' motion to dismiss.

Statement Disclosing Basis of Jurisdiction to Review the Judgment of the Supreme Court of Michigan.

Petitioner, a seaman, specially set up and claimed, in the only court which holds jurisdiction over the respondents (R. 36-37), a right of action for personal injuries under the Jones Act (June 5, 1920; 41 Stat. 1007).[3] The Jones Act is embraced within and constitutes a part of the general maritime law (*The Arizona* v. *Anelich*, 298 U. S. 123). Petitioner's right of recovery under the Jones Act was denied to him, by the successive decisions of the courts below, for assigned reason that the respondent State is possessed of an absolute defense of immunity *from liability* which it may interpose against an action so planted on the Jones Act. Petitioner has thus been clearly denied, by a State court of last resort, a right and privilege which

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[3] *Recovery for injury to or death of seaman.* Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." (46 U. S. C. A., sec. 688).

he has specially set up and claimed under specific statutes of the United States, and this case is consequently brought within the applicable terms of Section 237 (b) of the Judicial Code as amended.

Aside from the above, the Supreme Court of Michigan has erroneously interpreted the maritime law of the United States to the prejudice of petitioner. That court's majority has rather surprisingly applied the dissenting opinion in *Workman* v. *New York City,* 179 U. S. 552, rather than the prevailing opinion in that case, as determinative of the applicable maritime law, and petitioner has consequently been denied a maritime right of action which, under the maritime law, he has a clear right to prosecute in the court which holds jurisdiction over his presently suable maritime employer (Michigan).

Since:

(a) The State courts below were and are, "equally with the courts of the Union, obliged to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them" (*United States* v. *Bank of New York and Trust Co.,* 296 U. S. 479);

(b) The State courts "have jurisdiction, concurrently with the federal courts, to enforce the right of action established by the (Jones) Merchant Marine Act as a part of the maritime law" (*Engel* v. *Davenport,* 271 U. S. 33);

(c) The Michigan Court of Claims has exclusive jurisdiction to hear and determine tort claims against Michigan (R. 36-37), and

(d) The respondents freely admit, as they must, that Michigan by the same Court of Claims Act has expressly

waived its sovereign immunity *from suit* brought against it in such Court of Claims;

the Supreme Court of Michigan has, by its decision below, denied petitioner's rights under the Jones Act and has refused to apply, as determinative of the pleaded defense of Governmental immunity *from liability,* the applicable maritime law of the United States which was clearly expounded in the *Workman* case (179 U. S. 552).

On the foregoing premises, petitioner respectfully submits that this court's jurisdiction to review by certiorari, under 237 (b) of the Judicial Code, is clear.

Special Jurisdictional Statement (Rule 12).

Petitioner's (Federal) right under the Jones Act, which he seeks to have brought before this Court for review, was set up in the court of first instance (Mich. Court of Claims) by express pleading and reliance on the same (R. 6). That Court of original jurisdiction expressly recognized petitioner's reliance on the maritime law as enlarged by the Jones Act (R. 12), but held the local law to be decisive (R. 13). Petitioner thereupon preserved for review his claimed Federal right as aforesaid by assigning as error, on appeal to the Supreme Court of Michigan, the denial thereof (R. 1, 2).

The Supreme Court of Michigan duly reviewed the foregoing specifications of error and, having recognized the superiority of maritime law in maritime cases, nevertheless held that the maritime law does not, in present circumstances, preserve to a seaman the (Federal) right so claimed (R. 38).

The question so decided is substantial. It seriously affects the maritime rights of all seamen who happen to be injured or damaged by negligence in the course of Mackinac ferry operations, regardless of whether they are employed

by Michigan or not. For details in support of these representations, petitioner respectfully refers to the annexed memorandum.

Reasons Relied On for Allowance of Writ.

First: This is a case where a seaman's right of action under the Jones Act has been refused due hearing on the merits by a court holding jurisdiction to hear and determine the same. That right has been denied solely because the defendant State, as owner of the vessels involved and as petitioner's maritime employer, has interposed a defense which is not recognized by the maritime law, viz., Governmental immunity *from liability.*

We are not here concerned with any question of jurisdiction over the defendant State. The latter had admittedly, by the Act which created this Michigan Court of Claims, waived its immunity *from suit* in that court (R. 12, 13). The distinction is recognized by the majority opinion below (R. 35) and it was conceded by respondents' counsel from the very outset (R. 12) that the Michigan Court of Claims held jurisdiction to hear and determine this seaman's right of action subject only to a pleaded defense,—a defense of claimed immunity *from liability* which the defendant State contends it may interpose or omit at its pleasure. Thus the question was squarely presented to the court below:

Does the maritime law recognize or permit such a defense in a case that is planted on the maritime law?

The Supreme Court of Michigan answered by saying that it "preferred to follow the reasoning of Mr. Justice Gray in the Workman case, who with Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissented" (R. 37-38).

Petitioner, in turn, respectfully submits that the Supreme Court of Michigan was duty bound to follow this

court's prevailing opinion in the Workman case, wherein the applicable maritime rule was tersely summed up as follows:

> "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction."

Second: A vital question respecting maritime rights is presented by this petition for certiorari. The decision below will, if not reviewed, result in complete frustration and denial of maritime rights which are bound to arise in favor of passengers and shippers, the persons and goods of which are, for paid tolls accruing to Michigan (Mich. Stat. Ann. 9.1391), hourly carried across the Straits of Mackinac (8 miles course) by the vessels of the Michigan State Highway Department.

Furthermore, since the Straits of Mackinac constitute one of the busiest freight and passenger vessel arteries in the world, the rights of Great Lakes vessel owners and seamen, in collision cases arising out of the negligent navigation of these Highway Department ferry boats, will be prejudicially affected and denied by the decision below if same remains unchallenged.

In above connection it should be borne in mind that the Michigan Court of Claims is the only forum which may hear and determine maritime claims of like nature. By the Eleventh Amendment, a State is immune *from suit* in the courts of the United States, both in rem and in personam (Ex Parte State of New York, 256 U. S. 493; *Missouri* v. *Fiske*, 290 U. S. 18), and Michigan is similarly immune in her own Constitutional courts (*Longstreet* v. *Mecosta*, 228 Mich. 542). In view of these incontrovertible premises, the drastic effect of the decision below is apparent.

Third: The decision below exhibits a shocking injustice to seamen employed by Michigan. They are not eligible to compensation (in cases of maritime injury) under local compensation laws (*Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647), and they are expressly excluded, by sections 902(3) and 903(1,2), from operation of the Longshoremen's and Harbor Workers' Compensation Act.[4] Although they are wards of admiralty, and although the Jones Act was enacted for their protection and benefit (*The Arizona* v. *Anelich*, 298 U. S. 123), the decision below holds the Jones Act is ineffective as to them even in a court which admittedly is possessed of jurisdiction over the defendant State employer. The result is, under the decision below, that a seaman employed by Michigan (and his dependents in turn) is absolutely remediless even in cases where the grossest sort of negligence on the part of his employer has caused him to suffer injury or death.

In conclusion, petitioner respectfully submits that the interposition of this Honorable Court, by its writ of certiorari to review an obvious denial of a maritime right by a State court having jurisdiction and duty to guard and uphold that right, is plainly indicated.

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[4] "(3) The term 'employee' *does not include* a master or *member of a crew of any vessel*, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (33 U. S. C. A., sec. 902 (3).

"No compensation shall be payable in respect of the disability or death of—

(1) A master *or member of a crew of any vessel*, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof *or of any State* or foreign government, or of any political subdivision thereof." (33 U. S. C. A., sec. 903 (1, 2).

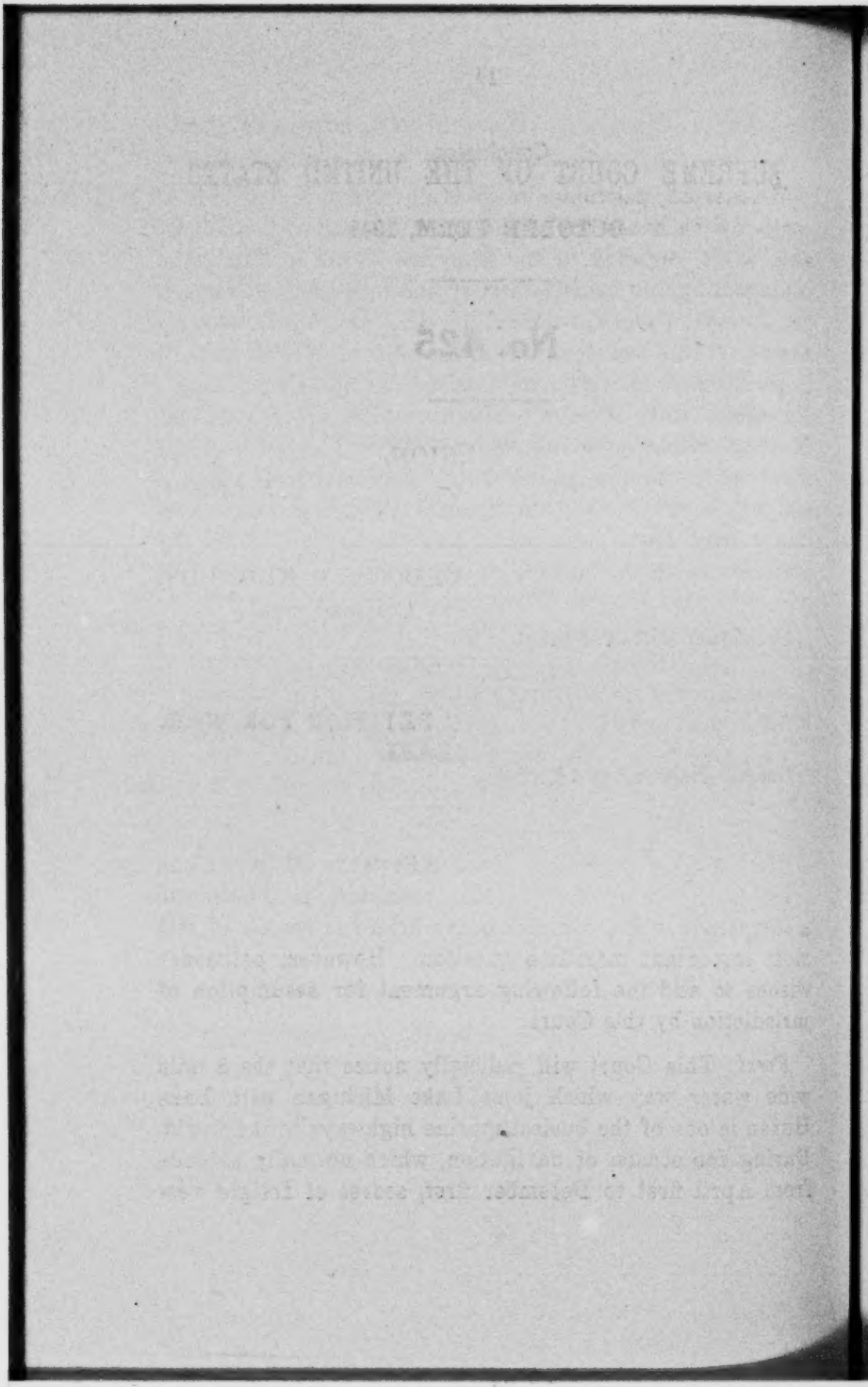
Conclusion.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the Supreme Court of Michigan, commanding that court to certify and to send to this court, for its review and determination, on a day certain therein named, a full and complete transcript of record and all proceedings in the case numbered and entitled on its docket, No. 41909, Luke Manion, claimant and appellant, against State of Michigan et al., defendants and appellees, and that the aforesaid judgment of the Supreme Court of Michigan may be reversed by this honorable court, and that petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just.

Petitioner will ever pray, etc.

LUKE MANION,
By EUGENE F. BLACK,
Counsel for Petitioner.

Dated—September 14, 1942.



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MEMORANDUM SUPPORTING PETITION FOR WRIT OF CERTIORARI.

The "Reasons Relied On For Allowance Of Writ," as set forth in the within petition, constitute in themselves a compendious and comprehensive brief for review of this most important maritime question. However, petitioner wishes to add the following argument for assumption of jurisdiction by this Court:

First: This Court will judicially notice that the 8 mile wide water way which joins Lake Michigan with Lake Huron is one of the busiest marine highways in the world. During the season of navigation, which normally extends from April first to December first, scores of freight ves-

sels are passing daily through these Straits (of Mackinac). Directly across the normal courses of these vessels lie the to and fro courses of the ferry vessels that are owned and operated by the Michigan State Highway Department. These ferry vessels operate each way on an hourly basis and, during the summer vacation periods especially, they are constantly jammed with vehicles, freight and passengers passing from one Michigan peninsula to the other. The Michigan Highway Department charges a regular toll for passage and shipment, and is required to keep its tolls at such figure as will insure defrayment of the cost of maintenance and operation (Mich Stat. Ann. 9.1394).

Necessarily, marine rights and liabilities are vitally involved in such ferry operations. By the very enabling statute (Mich. Stat. Ann. 9.1394), the Michigan Highway Commissioner is made "the agent of the State for the purpose of complying with the federal navigation laws" (sec. 3). Necessarily, the Highway Department hires many seamen to operate its fleet. As seamen, they should receive the same rights as are guaranteed other seamen whose vessels are constantly passing ahead and astern.

Despite the fact that their rights are supposed to be judged by the maritime law, and despite the fact that a maritime injury which is inflicted on him by his employer's negligence creates in favor of a seaman the right to prosecute, in any State or Federal court of competent jurisdiction, an action under the maritime law as enlarged by the Jones Act, the decision below singles out State (of Michigan) employed seamen and says that they have no remedy whatever against their employer, under the maritime law, even though injury or death may come to them through the most culpable kind of actionable negligence and even though a specified court, by an unconditional waiver of immunity *from suit* brought therein, has ap-

propriate jurisdiction over that employer. Bearing in mind that a seaman so injured at sea has no other remedy,[5] this bare statement of the situation is believed sufficient to provoke vigorous inquiry.

Second: It may and should be bluntly declared here that if this pleaded defense is not good in the maritime courts, it is equally not good in the State courts. The latter are just as much bound to follow the maritime law in maritime cases as the courts of the Union are (*Southern Pac.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,*[6] 253 U. S. 163; *Minnie* v. *Port Huron Terminal Co.,* 295 U. S. 647[7]; *United States* v. *Bank of New York & Trust Co.,* 296 U. S. 479). The Supreme Court of Pennsylvania, in *Garrett* v. *Moore-McCormick Co.* (Jan. 5, 1942), 23 Atl. (2) 504, has but recently recognized this obligation. To quote syllabus #2 of last cited case:

> "Where injured seaman, seeking recovery pursuant to the Jones Act for damages for negligence and for maintenance and care under the admiralty law, brought suit in the State Court, the State court had duty to apply the federal law creating the right of action, in the same sense in which the law would have been applied in the federal courts".

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[5] A seaman cannot be granted compensation under a local compensation act for a maritime injury (*Minnie* v. *Port Huron Terminal Co.,* 295 U. S. 647), and he is expressly excluded, by sections 902 (3) and 903 (1, 2) from operation of the Longshoremen's and Harbor Workers' Compensation Act. See, in connection with such express exclusion of seamen, *Warner* v. *Goltra,* 293 U. S. 160, and *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U. S. 257.

[6] "Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

[7] "We have held that the case of an employee injured upon navigable waters while engaged in a maritime service is governed by the maritime law. *Southern P. Company* v. *Jensen,* 244 U. S. 205; *Grant-Smith-Porter Ship Company* v. *Rohde,* 257 U. S. 469."

Third: The maritime law does not sanction any such result. 41 years ago this Court decided an important and decisive maritime case which has since remained unchallenged until the decision below was handed down. Reference is made to *Workman* v. *New York City,* 179 U. S. 566, where this Court definitely held that the maritime does not recognize a defense of immunity *from liability* which is planted on the doctrine of "governmental function". That decision of this Court has not been followed by the court below, the majority of which "preferred to follow the reasoning" of the dissenting opinion as delivered by Mr. Justice Gray (179 U. S. 574).

As to *Detroit* v. *Osborne,* 135 U. S. 492, which the majority below relied upon in making decision, it is sufficient to say that it is not a maritime case and does not purport to decide a maritime question (an injury sustained on a Detroit sidewalk was involved). The case was not cited or relied upon in any way by respondents' counsel below.

Fourth: This Court, in the *Workman* case, was not merely deciding that a *municipal corporation* may not rely, as a matter of maritime law, on the defense pleaded here. It fairly decided that such a defense *is not and will not be recognized in maritime cases.* Witness the exhaustive review [8] of relevant English and American maritime cases which commences on page 566 and ends on page 568 of the report with this summation:

> "The statement of the maritime law of England on the subject now being considered made in The Siren, supra, makes it clear that, in harmony with the maritime law of this country, the fact that a wrong has been committed by a public vessel of the crown affords no ground for contending that no liability arises,

[8] Reference is made, of course, to the prevailing opinion in the *Workman* case.

> because of the public nature of the vessel, although, it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given."

Again alluding to the fact that the Michigan Court of Claims admittedly held jurisdiction over the defendant sovereign by and through the Michigan Court of Claims Act,[9] it would appear that the decision below is in direct conflict with the *Workman* case.

Fifth: Singularly enough, petitioner might express his agreement with every thing said by the majority below and still be in a position to point out a clear denial of a federal right. In the majority opinion below it is first said (referring to Sec. 24 of the Court of Claims Act[10]):

> "I construe this to mean that the State's immunity from liability while engaged in a governmental function is preserved because the waiver of this defense would enlarge the 'present liabilities of the State' ".

This observation by Mr. Justice Bushnell is right enough as a general statement, but it is quite immaterial in a maritime case because, as we have seen by the *Workman* case, Michigan never had a maritime defense "of liability while engaged in a governmental function" to preserve by said Sec. 24. All Sec. 24 did was to preserve defenses Michigan might originally have relied upon if and where, by waiver of immunity from suit, it became suable, and the majority below does not contend otherwise. Michigan undoubtedly had such a defense of "governmental function" in non-maritime cases to preserve by said Sec. 24 (Cf. *Longstreet* v. *County of Mecosta,* 228 Mich. 542), but it never had such a defense (per the *Workman* case) to pre-

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[9] Summarized in appendix hereof.

[10] "This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies."

serve in a maritime case. Hence said Sec. 24 relevantly preserved nothing.

Mr. Justice Bushnell (writer of the majority opinion below), when he again referred to said Sec. 24, said:

> "All those defenses which might have been interposed in actions at law and chancery remain unchanged save only the immunity from suit." (R. 37).

Petitioner agrees and says that, in similar maritime cases, the defense pleaded here never could have been interposed by Michigan. To prove the point, let us visualize, before enactment of the Court of Claims Act, the same suit commenced by petitioner under the Jones Act in a District Court of the United States, with the respondent State formally waiving its immunity *from suit* but pleading the instant defense of immunity *from liability*. Would the pleaded defense have been good? The *Workman* case plainly answers "no".

Sixth: This is not a case where a State court has, by construction of State legislation, decided a case without offending a federal right. The court below has squared off on the merits of a maritime question and has decided that the maritime law does, or should, sanction this defense against a State employed seaman's right of action under the Jones Act. A federal question of substance has thus been decided by a State court of last resort, and petitioner asserts with due respect that it has been decided in a way not in accord with an applicable decision of this court (Rule 38, sub-section 5).

Respectfully submitted,

EUGENE F. BLACK,
Counsel for petitioner,
Michigan National Bank Bldg.,
Port Huron, Michigan.

September 14, 1942.

APPENDIX.

Summary of Michigan Court of Claims Act (Act. 135, P. A. 1939; Mich. Stat. Ann. 27.3548)

Section 1. *Title of act.* "This act shall be known and may be cited as 'the court of claims act'."

Section 2. *Creation of court; designation of judges; traveling expense of judge; disability or absence; death, powers of successor.*

Section 3. *Sessions; place of holding and for hearings; sheriff or deputy to serve as court officer; space and equipment.*

Section 4. *Clerk and stenographer; compensation; fees; assistants; court officer; service of process; expenses.*

Section 5. *Same; power to sign vouchers.*

Section 6. *Court of record; seal.*

Section 7. *Attorney general to represent state.*

Section 8. *Jurisdiction; exclusive nature; claims and demands within; set-offs and recoupments; judgment as res adjudicata, enforcement, finality; restrictions on jurisdiction.* "Except as provided in section (13) of this act, the jurisdiction of the court of claims as conferred upon it by this act over claims and demands (in excess of $100.00) against the state or any of its departments, commissions, boards, institutions, arms or agencies, shall be exclusive. The court shall have power and jurisdiction:

1. To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies."

Section 9. *Practice and procedure in general; supreme court may make rules.*

Section 10. *Practice re depositions.*

Section 11. *Subpoenas; production of books and records; contempt; administration of oaths and taking of acknowledgments.*

Section 11a. *Time within which claim or notice of intention to file claim must be filed; contents, copies.*

Section 12. *Manner of starting suit; pleadings; copies for attorney general and state agencies.*

Section 12a. *Entry of judgment on stipulated facts, proofs.*

Section 13. *Existence of remedy in federal court.* "No claimant shall be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it shall not be necessary in the petition filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion to dismiss filed by the state or the department, commission, board, institution, arm or agency thereof."

Section 14. *Hearings by judge without jury; new trials.*

Section 15. *Appeals.* "Appeals shall lie from the court of claims to the supreme court in all respects as if said court were one of the circuit courts of this state.

The procedure for the taking of appeals to the supreme court from the court of claims shall be governed by the statutes and court rules governing the taking of appeals from the circuit courts of this state to the supreme court in a case at law, without a jury."

Section 16. *Costs and security for costs.*

Section 17. *Limitation of time to prosecute claims against state; attorney general may petition for administration of estate or for guardian.*

Section 18. *Interest on claims; on judgments.*

Section 19. *Findings of fact and conclusions of law; judgment against state or agency thereof; payment; appropriations for payment; approval of vouchers; warrants in satisfaction of judgments, transmission to clerk.*

Section 20. *Clerk to report to legislature; statements to auditor general and budget director.*

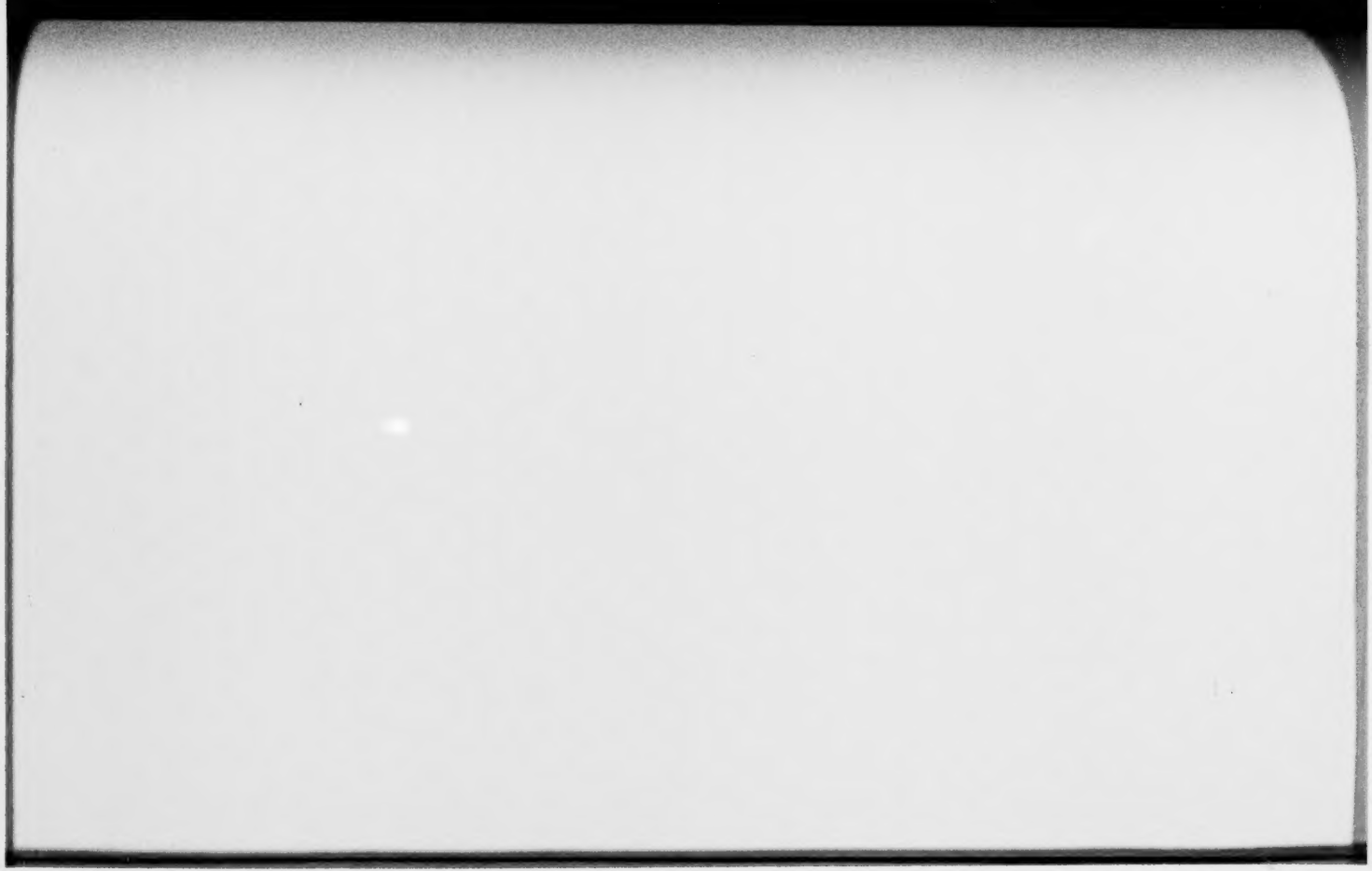
Section 21. *Payment of judgment as discharge.*

Section 22. *Power of court to call on officers or departments for examinations, information or papers; additional compensation prohibited.*

Section 23. *Fraud with respect to claims, forfeiture of claim.*

Section 24. *Act does not enlarge liability of state or its agencies.* "This act shall in no manner be construed as enlarging the present liabilities of the state and any of its departments, commissions, boards, institutions, arms or agencies."

Section 25. *Severing clause.*



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Supreme Court of The United States

OCTOBER TERM, 1942

No. 425

LUKE MANION,

Petitioner,

vs.

STATE OF MICHIGAN AND G. DONALD KENNEDY,
MICHIGAN STATE HIGHWAY COMMISSIONER.

APPELLEES' BRIEF OPPOSING PETITION FOR CERTIORARI

I

Opinions Below

The opinion of the Supreme Court of Michigan and the dissent of its chief justice were published subsequent to the filing of the petition for certiorari,

Manion v. State et al., 5 NW [2d] 527.

II

Questions Presented

The preliminary question for decision may be stated thus:

Where the highest court of the State of Michigan in contemplation of an act of her legislature that in general terms permits her to be sued in a 'court of claims' created solely for that purpose,[*] has construed express provisions thereof to mean 'that the State's immunity from liability while engaged in a governmental function is preserved because the waiver of this defense would enlarge the "present liabilities of the State" ',[†]

holding:

that the terms of the State's consent [to be sued, provided in the act] define the jurisdiction of the 'court of claims' thus created, to entertain the suit at bar,—

that the State is not liable [in this instance] because of its sovereign immunity from liability in the performance of a governmental function and not because of its sovereign immunity from suit,—

---

[*]

It is provided in Michigan's Constitution that the Board of State Auditors 'shall examine all claims against the State not otherwise provided for by general law' [Article VI, § 20, State Constitution].

[†]

Section 24 of the Michigan 'court of claims act', so construed, reads: "This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies" [§ 24].

that the 'court of claims', by the limitations expressed in the act creating it, does not possess the jurisdiction of a court of admiralty, nor does it have a 'general capacity to stand in judgment',—

that the State has not waived its immunity from suit for a maritime tort in the courts of the United States,—

and that the reasoning of *Workman v. City of New York*, 179 U. S. 552, 'should be limited to actions on maritime torts against those municipalities which, like the City of New York, have the capacity to sue and be sued' [and has no application to State sovereignty],—

is the Supreme Court of the United States bound by such statutory construction, or can it be said that a federal question is presented?

Act No. 135, §§ 2, 8, 24, Pub. Acts of Michigan 1939 (5 Comp. Laws of Michigan 1929, Mason's 1940 Cumulative Supplement, §§ 13862-2, 13862-8, 13862-24 [Stat. Ann., 1942 Cum. Supp., §§ 27.3548-2, 27.3548-8, 27.3548-24]).

Constitution of the United States, Article I, § 8, Article III, § 2, and the Eleventh Amendment.

Judicial Code of the United States, § 24 [28 USCA, § 41-3]; the 'Jones Act' [46 USCA, § 688] and the Federal 'Employers Liability Act', incorporated in the 'Jones Act' by reference [45 USCA, §§ 53, 54, 55, 56 and 57].

III

Summary Statement of the Matter Involved

The following statement is deemed necessary in correcting certain inaccuracies and omissions in the petition for certiorari [Supreme Court Rule No. 27 (3)].

The Supreme Court of Michigan in the cause below undertook to construe the local statutory provisions about which the conflict revolved [Michigan 'Court of Claims Act' *supra*, § 24]:

> "Sec. 24. This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies".

The respondents (State of Michigan and her highway commissioner, defendants below) do not concede that, by the 'Court of Claims Act' *supra*, Michigan's sovereign immunity from suit brought against her in that court was and is '*unconditionally*' waived. Rather is it our position that while in general terms this statute [§ 8] permits the State to be sued in a special legislative court created solely for that purpose [§ 2], section 24 thereof, as construed by the highest court of the State, excludes from the jurisdiction of the 'Court of Claims' any claim arising from the negligence or carelessness of an officer, servant, agent or employe of the State in the performance of a governmental function.

In short, the State of Michigan has not given her express consent to be sued for the commission of such a tort; and, in granting permission to be sued, the legislature of a sov-

ereign State [as distinguished from a municipal corporation having power to sue and be sued] may set limits upon the jurisdiction of a 'court of claims', and such a jurisdiction, so defined by local State law, cannot be extended by federal statutes enacted in exertion of power under the 'maritime law' (Federal Constitution, Article III, § 2; Judicial Code, § 24-3 [28 USCA, § 41-3]; the 'Jones Act', § 20 [46 USCA, § 688], incorporating by reference certain provisions of the Federal 'Employers Liability Act' (Railroads) [45 USCA, §§ 53, 54, 55, 56 and 57].

IV

ARGUMENT

POINT ONE

The Michigan 'Court of Claims Act', § 24, supra, as construed by the highest court of that State, preserves the State's immunity from liability while engaged in a governmental function, and thereby limits the causes for which suit may be brought, thus excluding from the jurisdiction of the 'Court of Claims' all actions based upon liability for the negligent acts of her agents, servants or employes engaged in the performance of governmental functions.

First: Statutes permitting suits against the State, being in derogation of its sovereignty, must be strictly construed,

25 R.C.L., States, § 52, p. 416,

United States v. Sherwood, 312 U. S. 584,

and in granting such permission the legislature of a State may impose conditions and define the limitations of jurisdiction.

When this principle was recently applied to suits brought against the United States of America,

> *United States v. Sherwood, supra* [312 U. S. 584, 586, 587, 591],

Mr. Justice Stone, speaking for the Court, had occasion to say:

> "The United States, as sovereign, is immune from suit save as it consents to be sued [citing authorities], and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit (citing cases)".

Again [p. 587]:

> "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts . . . of the United States', which it is free to exercise through judicial as well as non-judicial agencies (citing authorities). It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims".

And [p. 591]:

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the

> issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction".

This doctrine of the *Sherwood* case upon which the Michigan Supreme Court relied, has been evoked by many States of the Union to protect their rights of sovereignty:—

> ". . . . If the State consents to be sued, it is only in the manner it prescribes. And all persons seeking to avail themselves of the privilege must accept it subject to the terms and conditions attached thereto or forming a part of the right as granted by the State. Thus, the State has a right . . . . to limit the right to sue to certain specified causes. . . . Statutes permitting suits against the State must be strictly construed, being in derogation of its sovereignty",
>
> 25 R.C.L., States, § 52, p. 416.

It has been said that permission to sue the State is in the nature of an offer 'which must be accepted as made',

> *Innes v. McColgan* (Cal. App.), 126 P [2d] 930,

that if the legislature sees fit to permit the State to be sued, it may, by general law, prescribe the class or classes of cases and the terms and conditions upon which suit may be brought,

> *State v. Love,* 99 Fla. 333, 126 So. 374,

and a State's consent to be sued on contracts of the state highway commissioner is deemed not to include consent to

the attachment of warrants, held by the state highway commissioner, payable to a highway contractor,

Barker v. Hufty Rock Asphalt Co., 136 Kan. 834.

So, too, the high court of Mississippi has held that a statute of that State, when authorizing suit against an agency of the State, is the measure of power to sue; a general statutory authorization to sue a governmental subdivision or agency creates no liability, and a suit is maintainable thereunder only for a liability authorized by statute,

State Highway Commission v. Gulley, 167 Miss. 631, 145 So. 351.

The Texas Court of Civil Appeals, in an action against the State for damages for the death of a minor which occurred in an automobile collision accident, held as follows:

"(Syl. 1) The State of Texas is not liable in damages for the negligence or misfeasance of its officials, agents or employees, unless such liability is voluntarily assumed by an act of the legislature".

"(Syl. 2) The 'respondeat superior doctrine' has no application to the State of Texas, its exemption being based on its sovereign character".

"(Syl. 6) The legislature is authorized to waive the State's immunity for negligence of its agents, but its intention to do so should appear by clear and unambiguous lanuage".

"(Syl. 7) The statute making a 'municipal corporation' liable for death of any person caused by wrongful act, neglect, carelessness or default of its agents or servants does not waive the State's immunity from liability for negligence of its agents, since the words

'municipal corporation' in the statute do not include the State",

Welch v. State (Tex. Civ. App.-1941), 148 S.W. [2d] 876.

The supreme court of Washington has said:

"It is well settled that an action cannot be maintained against the State without its consent, and that the State, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the State being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed",

State, ex rel. Pierce County, v. Superior Court, 86 Wash. 685. 151 Pac. 108,

and later followed this decision in principle,

State v. Superior Court, 9 Wash [2d] 309, 114 P [2d] 1001.

Cf. *Robison v. State,* 263 App. Div. 240, 32 NYS [2d] 388.

Second: The Supreme Court of Michigan rested decision in this cause on two major premises: [1st] the State's sovereign immunity from liability for the negligent acts of her servants, agents and employes while engaged in performance of a governmental function, holding that such immunity was preserved by the 'court of claims act' (§ 24); and [2d] by the same token, the Court was of the opinion that the provisions of § 24 also demarcate jurisdiction of the 'Court of Claims'.

Although the Michigan Supreme Court recognize a clear distinction between 'sovereign immunity from suit' and 'sovereign immunity from liability', and refer to the latter as a 'defense' preserved by § 24 of the act,[*] a close reading of the prevailing opinion will disclose that decision also turned upon a lack of jurisdiction in the 'Court of Claims'.[†]

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[*]

"There is a distinction said the Court between sovereign immunity from suit and sovereign immunity from liability. The latter exists when the sovereign is engaged in a governmental function. The former may be waived without a waiver of the latter".

"I construe this (§ 24 of the act) to mean that the State's immunity from liability while engaged in a governmental function is preserved because the waiver of this defense would enlarge the 'present liabilities of the State' ".

"The State is not liable in this instance because of its sovereign immunity from liability in the performance of a governmental function and not because of its sovereign immunity from suit".

[†]

But the court also say: (concerning jurisdiction)

"The terms of the State's consent to be sued in any court define that court's *jurisdiction* to entertain the suit,

United States v. Sherwood, supra [212 U. S. 584].

The 'court of claims' is a legislative and not a constitutional court and derives its powers only from the act of the legislature and ***subject to the limitations therein imposed.*** The existing liabilities of the State were not enlarged by the court of claims act. [See § 24 thereof]. All those defenses which might have been interposed in actions of law and chancery remain unchanged save only the immunity from suit" [Emphasis supplied].

"The court of claims, ***by the limitations expressed in the act creating the court,*** does not possess the jurisdiction of a court of admiralty; nor does the State have 'a general capacity to stand in judgment' . . . . Nor has the State waived its immunity from suit for a maritime tort in the courts of the United States".

Whether the Supreme Court of Michigan, in construing the 'court of claims act', proceeded on the theory that considerations of State sovereignty bar recovery in this case because of 'immunity from liability', or because of 'immunity from suit', the result is the same, for the court also drew attention to the fact that the State Constitution [Article VI, § 20] provides:

> "Sec. 20. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors. They shall examine and adjust *all claims* against the State not otherwise provided for by general law" . . . .

Thus, while the Constitution itself, in plain and unambiguous language, permits the legislature to provide by general law for the examination and adjustment of any claim against the State [by such an agency as it may create], it requires that the legislature, in exertion of such a power, shall clearly define the nature and character of the claims thus to be examined and adjusted; and if, in creating a 'court of claims' for that purpose, the legislature [as it did in this instance] excludes actions or claims arising from acts of negligence in the performance of governmental functions [§ 24, as construed by the court], then it follows that the 'court of claims' so created is without jurisdiction to entertain them. In such an event, the constitutional board of state auditors retains exclusive jurisdiction.

It is, of course, axiomatic that the Supreme Court of the United States consider themselves bound by such a statutory construction as we have here.

Where the decision of a State court rests upon 'an inde-

pendent ground adequate to sustain it and in harmony with an asserted federal right, there is no denial of that right',

Rogers v. Hennepin County, 240 U.S. 184.

Where, as at bar, the judgment rests upon two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, the United States Supreme Court will not take jurisdiction,

Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300,

Fox Film Corporation v. Muller, 296 U.S. 207,

Cf. *Municipal Investors Ass'n v. Birmingham,* 316 U.S. 153.

This rule has been stated to be that this Court is without jurisdiction to review a State court's decision construing the statutes of its own State,

Neblett v. Carpenter, 305 U.S. 297,

Alton R. Co. v. Illinois Commerce Commission, 305 U.S. 548.

Moreover, the highest court of a State is the ultimate judge of the extent of its jurisdiction, and unless a denial of a federal right is involved, its decision upon that subject is final and conclusive,

Dayton Coal & Iron Co. v. Cincinnati, New Orleans, & Texas Pacific R.R. Co., 239 U.S. 446.

POINT TWO

The decision below does not deny a federal right, for the 'maritime law' of the United States (Federal Constitution, Article I, § 8, Article III, § 2, as limited by the Eleventh Amendment) cannot operate to destroy State sovereignty.

Although in ordinary suits between private parties, or even in actions against a municipal corporation which has general power to sue and be sued in any court,

Workman v. City of New York, 179 U.S. 552,

the maritime law of the United States, or the 'law of the sea', as it is sometimes called, is supreme, and in such actions Federal and State courts have concurrent jurisdiction by virtue of the Judicial Code, § 24-3 (28 USCA, §41-3), and the 'Jones Act', § 20 (46 USCA, § 688), has extended to seamen certain privileges created by the 'Employers Liability Act' (45 USCA, §§ 53, 54, 55, 56, 57),

Engel v. Davenport, 271 U.S. 33,

Panama Railroad Co. v. Vasquez, 271 U.S. 557,

Lindgren v. United States, 281 U.S. 38,

The Arizona v. Anelich, 298 U.S. 110,

we respectfully submit the People never intended to delegate or surrender to the Congress [United States Constitution, Article III, § 2] unrestricted power [Eleventh Amendment] to superimpose that system upon the States themselves in derogation of their sovereign immunity from suit or sovereign immunity from liability.

Petitioner's counsel does not deny that, in the operation of ferries across the Straits of Mackinac, in connection with Michigan's highway system, the officers, agents, servants and employes of the State were performing a governmental function; the Supreme Court of Michigan so held, and no error is assigned thereon.

It is well-established that a sovereign State is not liable for the torts of its officers, agents, servants or employes, committed in the performance of governmental functions, and that legislative intent to waive this immunity must be expressed in clear and unambiguous language,

59 Corpus Juris, States, § 339, citing

Collins v. Commonwealth, 262 Pa. 572, 106 Atl. 229,

and 'if the State consents to be sued, it is only in the manner it prescribes',

Murray V. Wilson Distilling Co., 213 U.S. 151,

and see cases cited under 'Point One' of this brief.

The Supreme Court of Michigan has repeatedly announced this general rule of non-liability for torts,

Gilboy v. Detroit, 115 Mich. 121,

Shipman v. State Livestock Commission, 115 Mich. 488,

Gunther v. County Road Commissioner, 225 Mich. 619,

Longstreet v. County of Mecosta, 228 Mich. 542,

Baszkiewcz v. Board of Education of Detroit, 301 Mich. 212, 3 NW [2d] 71.

Chloa Mead, Admrx v. State of Michigan and Public Service Commission, decided by Supreme Court of Michigan, October 21, 1942.

A general statute authorizing suits against the State does not permit recovery for torts of its officers, agents, or servants,

Locke v. State, 140 N.Y. 480,

Smith v. State, 227 N.Y. 405, 125 N.E. 841, 13 ALR 1264,

Wilson v. State Highway Commissioner (Va., 1939), 4 SE [2d] 746,

Holzworth v. State (Wis.), 298 N.W. 163.

Petitioner's counsel argues that because of the necessity for uniformity and harmony in the operation of the 'maritime law', this Court has freed that code from any measure of State control; therefore [it is said] once the State has consented to be sued in any forum, it may no longer claim 'immunity from *liability*' for the maritime torts of its officers, agents, servants, or employes; and he relies entirely upon the principle that guided this Court in arriving at its decision in

Workman v. New York City, 179 U.S. 552.

We respectfully submit that the *Workman* case, however applicable to a municipal corporation sued in a court of admirality for a maritime tort, does not go so far as counsel would believe.

And there are other cases which go contrary to counsel's views.

In the *Workman* case, *supra*, the decision was that a municipal corporation which possesses the general power

to sue and be sued may not, in a court of admiralty having jurisdiction under the Federal Constitution (Article III, § 2) successfully raise the bar of sovereign immunity from liability for the torts of its servants, agents, and employes; for in such a case the 'maritime law' of the Nation controls.

It is noteworthy that the case of *Workman* was instituted in a federal court of admiralty jurisdiction engaged primarily in enforcing the 'maritime law', and that this Court in its prevailing opinion repeatedly emphasizes this fact. [*]

Speaking of the evils which would flow from an affirmative answer to the question presented, this Court say:

> "This (a lack of harmony and uniformity) must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing

---

[*]

After stating the facts, the Court defined the questions presented for decision:

"We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and second, if the case is governed by the maritime law, whether the city of New York is liable. In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not — as was the case in *Detroit v. Osborne* (1890), 135 U.S. 492, . . . — whether the local law governs as to a controversy arising *in the courts of the common law* or of equity of the United States, but, does the local law, if in conflict with the maritime law, *control a court of admiralty of the United States in the administration of maritime rights and duties*, although judicial power with respect to such subjects has been expressly conferred by the Constitution (article 3, § 2) upon the courts of the United States"?

that *those who are amenable to the jurisdiction of courts of admiralty* are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor". (Emphasis supplied). [†]

Again, it is said:

When discussing many of the earlier cases cited in the opinion, this Court observes the duty of '*admiralty courts*' to

> "administer redress for every maritime wrong *in every* case where they (courts of admiralty) *have jurisdictional power over the person by whom the wrong has been committed*". (Emphasis is ours).

And the final conclusion is reached:

> "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability *in a court of admiralty, where the court has jurisdiction.* This being so, it follows that as the municipal corporation of the City of New York, *unlike a sovereign*, was subject to the jurisdiction of the court, the claimed exemption from liability. . . . was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admirality". (Italics, ours).

[†]

"Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, ... we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this Court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of *in a cause of action maritime in its nature and depending in a court of admiralty of the United States*". (Italics, ours).

Boiled down, the opinion seems to be based on the proposition that in the exercise of jurisdiction and power delegated to the judiciary of the United States by the Constitution [Article III, § 2], courts of admiralty will not sanction the doctrine of immunity from liability when such a defense is made by a municipal corporation over which an admiralty court of the United States has lawful jurisdiction.

This rule or principle cannot, we submit, be applied to a sovereign State of the Union.

While this Court has not passed upon the precise question now presented for determination, we find authority for our position in an opinion written by Judge Learned Hand when sitting in the district court of the United States for the southern district of New York,

The Onteora (1923), 298 Fed. 553.

There, the court held that the commissioners of (New York State's) Palisades Interstate Park were exempt from liability (as a *state* agency) as a tort-feasor, notwithstanding that they were a corporation created by the laws of the State of New York, and subject to suit, and the fact that the suit was in admiralty made no difference.

Judge Hand said, in part:

> "The libelant's argument is that the corporate form given to the claimants, together with their express subjection to suit, shows an intention to make them generally liable like a *municipality*, and that municipalities, except in their governmental functions, are liable as tort-feasors (citing authorities). *But the distinction in respect of municipalities has never been*

applied to a State, which can be made liable only when it has given an express consent. Moreover, the claimants are not *a municipality,* as I have said, though a 'body politic'. Besides, *the argument that consent to be sued carries by implication the recognition of a liability in tort was met and denied in Smith v. State, supra* (227 N.Y. 405). Finally, the fact that this is a suit in admiralty makes no difference. *Ex Parte State of New York,* No. 1, 256 U.S. 490. . . Therefore, I think that the case fails, because there is no liability *in personam,* and hence no maritime lien arising from what would be a tort if committed by a private vessel". (emphasis supplied).

The foregoing opinion is in harmony with the general rule that vessels in the public service of a State are not subject to a suit in admiralty,

2 Corpus Juris., Secundum, Admiralty, § 19,

Ex Parte New York, 256 U.S. 490, 503,

The Charlotte, 285 Fed. 84 (affirmed, 299 Fed. 595; certiorari denied, 266 U.S. 604).

V

Conclusion

We respectfully submit, on the bases of the reasons assigned in this brief, that the writ of certiorari should be denied.

Respectfully Submitted,

HERBERT J. RUSHTON,
Attorney General for the
State of Michigan
Counsel for Respondents

End